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No. 633

Supreme Court of the United States

OCTOBER TERM, 1963

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENTS TRICO OIL AND GAS COMPANY AND GENE REID DRILLING, INC. IN OPPOSITION

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BRIEF OF RESPONDENTS TRICO OIL AND GAS COMPANY AND GENE REID DRILLING, INC. IN OPPOSITION

Respondents Trico Oil and Gas Company and Gene Reid Drilling, Inc., both California corporations, oppose the petition for a writ of certiorari to review the judgment of the United States District Court of Appeals for the Ninth Circuit, entered on June 18, 1963, on the ground that the order and judgment of dismissal of action made by the United States District Court for the Northern District of California, Southern Division (Albert C. Wollenberg, J.), in Civil Action 34043,

and entered on March 30, ~~1963~~ 1962 which granted, among other motions to dismiss, the motion of these respondents to dismiss petitioner's second amended complaint for failure to join indispensable parties whose joinder would deprive the Court of jurisdiction, and for lack of jurisdiction over indispensable parties, two of whom were citizens of the State of Nevada, the state of incorporation of petitioner, and the affirmance of that judgment by the Court of Appeals, demonstrated strict adherence to the accepted and usual course of judicial proceedings.

OPINION AND ORDERS BELOW

The Order and Judgment of Dismissal of Action of the United States District of the Northern District of California, Southern Division (Albert C. Wollenberg, J.), entered ~~June~~ March 30, 1962 granting, among other motions to dismiss, the motion of respondents Trico Oil and Gas Company and Gene Reid Drilling, Inc., to dismiss petitioner's second amended complaint for failure to join indispensable parties whose joinder would deprive the Court of jurisdiction, and for lack of jurisdiction over indispensable parties (R. 898-907), is unreported. It appears in the Appendix hereto at page 1a.

Judge Wollenberg's memorandum opinion of March 12, 1962 (R. 892-898), is unreported. It appears at page 10a of the Appendix to the petition for the writ. The order made in the action by United States District Judge Oliver J. Carter granting petitioner leave to file

its second amended complaint and reserving to the respondents the right to further move to dismiss that second amended complaint for want of jurisdiction, or for want of indispensable parties (R. 543-545), is not reported. It appears in the Appendix hereto at page 10a.

QUESTION PRESENTED

These respondents do not agree with petitioner's statement of the question presented. Other respondents undoubtedly will also disagree, but so far as the motion of these respondents is concerned, the question presented is whether the granting by Judge Wollenberg, and the affirmance thereof by the Court of Appeals, of respondents' motion to dismiss petitioner's second amended complaint for want of indispensable parties defendant, two of whom were citizens of the State of Nevada, the state of incorporation of petitioner, made pursuant to a right expressly reserved by order of Court when leave was granted to petitioner to file that second amended complaint, and based upon respondents' evidence, not controverted in any respect by petitioner, showing there were absent co-owners of real property conveyed by petitioner in 1941 by a deed which petitioner claimed constituted a fraud upon it to the knowledge of all the grantees in the deed, two of whom are still co-owners, constituted such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

RULE INVOLVED

Rule 12(b) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in a responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party."

STATEMENT

Respondents' motion to dismiss arose out of the allegations of Exhibit 58 to petitioner's second amended complaint (R. 528-533). This exhibit appears in the Appendix hereto at page 13a.

Respondents' motion to dismiss, with a list of nine exhibits introduced in support of the motion and considered by the Court of Appeals on the original papers (R. 854-861), appears in the Appendix hereto at page 19a.

In paragraphs 1 and 2 of Part I of Exhibit 58, petitioner attacked, as induced by what it claimed was

a fraud upon it; a transaction by which it conveyed lands in Madera County, California, by a deed dated July 29, 1941 (R. 528-530).

At the end of paragraph XV of its second amended complaint (R. 431-432), petitioner alleged that in Part I of each exhibit to that complaint it would set out, among other details, the "names of the grantees" in the conveyances it claimed it was caused to make pursuant to what it contended was a conspiracy to defraud it of its land. When it came to Exhibit 58, however, petitioner carefully avoided naming three of the grantees in the 1941 deed it was attacking.

This was done by the device of alleging that its conveyance was to defendant (now respondent) Elmer B. Stone "and others" (R. 530).

At the hearing of respondents' motion before Judge Wollenberg on January 24, 1962, respondents introduced as Exhibit T-1 a certified copy of that 1941 conveyance made by Miller & Lux Incorporated (R. 969).[1]

Exhibit T-1 showed that the Miller & Lux conveyance of July 29, 1941 was made to "William H. Moffat, of Reno, Nevada, as to an undivided one-quarter interest, Nellie C. Harris, as to an undivided one-quarter

[1]Respondents' designation of additional certiorari records requested the Clerk of the Court of Appeals for the Ninth Circuit to include in the record on certiorari this Exhibit and eight other of respondents' exhibits which the Court of Appeals considered on the originals. This designation appears in the Appendix hereto at page 27a. The Clerk of the Court of Appeals for the Ninth Circuit forwarded these original exhibits to the Clerk of this Court on October 22, 1963.

interest, Charles S. Howard, as to an undivided one-quarter interest, and Elmer B. Stone, as to an undivided one-quarter interest, as grantees;" (R. 969). Only Elmer B. Stone was named as a party in this action.

Part II of each exhibit sets out the so-called "transferee" transaction which were secondary transactions whereby other persons acquired interests in these lands under what petitioner claimed was notice of petitioner's purported rights.

In paragraphs 11, 13 and 14 of Part II of this Exhibit 58 (R. 530-533), petitioner alleged that these respondents had acquired interests in oil and gas leases by partial assignments. These were the three oil and gas leases identified in paragraphs 1, 5 and 9 of Exhibit 58 (R. 530-532), which covered a considerable part of the lands conveyed by petitioner's 1941 deed.

Here again, petitioner carefully avoided a disclosure that William H. Moffat and May Moffat, his wife, were among the co-owners of the lands who, as lessors, joined in executing these three oil and gas leases. In paragraph 1 of Part II, this was done by alleging that the lease was executed by Elmer B. Stone and Eleanor G. Stone, his wife (R. 530). Respondents' Exhibit T-4 (R. 973) showed that William H. Moffat and May Moffat were also lessors in this lease.

In paragraphs 5 and 9 of Part II, the allegations were that the leases were from or executed by Elmer B. Stone and Eleanor G. Stone "and others" (R. 531-532). Respondents' Exhibits T-5 and T-6 (R. 975)

and Exhibit T-7 (R. 977) showed that the "and others" included William H. Moffat and May Moffat, his wife.

In Exhibit 58 petitioner alleged the date and book and page of the recording of each of these instruments in Madera County, so it knew who the "and others" were. Obviously, petitioner had to conceal the Moffats' interest in this property in order to maintain its claim of diversity jurisdiction.

Evidence was also introduced to show that the Moffats still owned their interests in the real property and in the oil and gas leases at the time of the motion, that they were citizens of the State of Nevada, that respondents still owned their interests in the oil and gas leases, that the leases were in force and effect, that gas was being produced under them, and that royalties were being paid to the lessors (Exhibit T-2, R.970; Exhibit T-3, R. 971).[2]

Petitioner did not challenge the merits of the motion in any respect. It did not introduce any evidence in opposition to the motion, nor did it make any attempt to controvert respondents' evidence in any respect.

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[2]In their answering brief before the Court of Appeals these respondents called to the attention of the Court of Appeals that newspaper accounts published January 2, 1963, reported that William H. Moffat died on January 1, 1963, and that he was survived by his wife, May Moffat. The controlling date for determining jurisdiction of the United States District Court in diversity cases is the citizenship at the date of the commencement of the suit: *Anderson* vs. *Watt* (1891) 138 U.S. 694, 702; *Minneapolis R. R.* vs. *Peoria Ry. Co.* (1925) 270 U.S. 580, 586.

Among other motions which Judge Wollenberg also granted was a motion by these respondents to dismiss for failure to state a claim upon which relief can be granted (R. 628-632). As there were other similar motions granted at the same time, which will undoubtedly be discussed at some length in at least one other brief of respondents, no further discussion will be set out in this brief, except to comment that petitioner's second amended complaint added an Exhibit 67 (R. 539-542) which was not in petitioner's first amended complaint, which ended with Exhibit 65 (R. 198-200). Exhibit 67 alleged in Part II that respondent Trico Oil and Gas Company in 1934 acquired an interest in an oil and gas lease petitioner had executed. The second amended complaint, to which Exhibit 67 was added, was filed April 17, 1958, more than three years after the July 22, 1954 date, which petitioner concedes ended its so-called "captivity" (R. 455). Respondents' motion set up the bar of the three year statute of limitations contained in California Code of Civil Procedure Section 338(4).

REASONS FOR DENYING THE WRIT

In addition to petitioner's complete lack of any challenge directed to the merits of the indispensable parties motion of these respondents, which Judge Wollenberg granted, and its complete lack of any attempt to controvert in any way respondents' evidence in support of that motion, there are a number of other undisputed facts in the record of this case with reference to respondents' motion which demon-

strate that there was a strict adherence to the accepted and usual course of judicial procedures by Judge Wollenberg in granting this motion of respondents and by the Court of Appeals in affirming his judgment.

As petitioner indicated on page 8 of its petition, a number of motions were filed which were denied by United States District Judge Carter on May 15, 1956 (R. 368-379). These respondents filed a jurisdictional motion (R. 217-218) which Judge Carter denied. These motions were raised against petitioner's *first amended complaint* filed October 31, 1955 (R. 64-200), and subsequently superseded by a second amended complaint.

The indispensable party motion respondents filed December 20, 1961 (R. 854-860), which was heard by Judge Wollenberg on January 24, 1962 (R. 964-991), and subsequently included in the motions granted by him (R. 898-900), was raised against petitioner's *second amended complaint* filed April 17, 1958 (R. 422-542).

This second amended complaint was filed pursuant to leave granted petitioner by an order made by Judge Carter on April 17, 1958 (R. 543-545). It is included in the Appendix hereto at page 10a. This order expressly reserved to the respondents the right to further move to dismiss petitioner's second amended complaint for want of jurisdiction or for want of necessary or indispensable parties "either by formal renewal of any such motion heretofore made, or by the making

of all or any of such motions on grounds not heretofore stated" (R. 544-545).

Before Judge Carter signed that order on April 17, 1958, there was an extensive discussion at the hearing on that date regarding the right of respondents to file jurisdictional motions as to the second amended complaint. Excerpts are in the record (R. 1035-1043).

At the hearing Judge Carter made it very clear that he believed he had no right to preclude respondents from raising jurisdictional points as to the second amended complaint. At one point in the hearing counsel for these respondents asked the following question and Judge Carter made the following reply (R. 1035):

> "MR. DAVIE: Your Honor, one thing in line with the discussion you just had with Mr. Potter. I would like to have the right to determine, if this second amended complaint is filed, whether I feel it supersedes the first to the extent that I feel I should make my motion on jurisdiction over again.
>
> "THE COURT: Well, I think you should have the right to do so, but again indicating to you that I am not going to change my mind on that unless there is some sound and cogent reason for doing so."

Furthermore, when these respondents presented their indispensable parties motion to Judge Wollenberg on January 24, 1962, grounds were included in support of the motion that were not available for

presentation when their jurisdictional motion to dismiss petitioner's first amended complaint was argued before Judge Carter on December 1, 1955.

In 1955 petitioner's then counsel, Mr. John Hodgson, in opposing the jurisdictional motion of these respondents, based his argument that the Moffats and the other absent owners were not indispensable parties on the premise that they are included among . . . "literally hundreds and thousands of bona fide purchasers involved, directly or indirectly." (R. 340)

In his brief in opposition to respondents' 1955 motion to dismiss (R. 223-232), Mr. Hodgson made it very clear that he included the Moffats among these bona fide purchasers whose interests he claimed could not be affected by petitioner's complaint. He said (R. 228):

> "But, whatever interest may be returned to the plaintiff, we recognize that it must be returned subject to the rights of innocent purchasers such as the Johnsons and the Moffats."

Judge Carter's 1956 decision made it very clear that he considered that this contention of the petitioner that the Moffats and other absent owners were innocent purchasers to be the vital basis for his decision on those motions. In part he said (R. 376):

> "If innocent third parties have acquired interests in some of the property which plaintiff seeks, this Court can award damages in lieu of that

property (in the event of an ultimate decision in favor of plaintiff) and frame its decree so as to protect the interests of those absent parties."

Having thus secured a favorable decision on this jurisdictional point, petitioner then completely reversed its claim that the Moffats and the other absent owners were bona fide purchasers.

On June 6, 1958, petitioner filed its verified "Answers to Interrogatories propounded by respondent Natural Gas Corporation of California" (R. 554-567).

In its interrogatory III, respondent Natural Gas Corporation of California asked petitioner this question (R. 563):

"Interrogatory III: As to each transaction referred to in Exhibit 58, specify:

"1. Whether it is claimed that Donald C. Young, Phyllis Pearl Young, William H. Moffat, May Moffat, Charles S. Howard and Nellie C. Harris, or any thereof, were parties to the 'common scheme and design' alleged in Paragraph VII of the first amended complaint at the time of the traction or transactions to which they were party, specifying those who are claimed to have been."

Petitioner gave this answer (R. 563):

"Plaintiff claims that Donald C. Young and Phyllis Pearl Young were parties to the common

scheme and design alleged in Paragraph VII of the first amended complaint at the time of the transaction to which they were party. *Plaintiff is unable to state prior to the completion of discovery whether William H. Moffat, May Moffat, Charles S. Howard and Nellie C. Harris were parties to the common scheme and design.*" (Emphasis added)

Next, Natural Gas Corporation of California asked petitioner this question (R. 563-564):

> "As to each person named in paragraph 1 above who is not claimed to have been a member of said alleged 'common scheme and design,' is it claimed that any such person or persons had knowledge or notice of said alleged 'common scheme and design' at the time of the transaction or transactions to which they were party which would prevent such person or persons from being a bona fide purchaser, specifying each such person."

Petitioner gave this answer (R. 564):

> "Plaintiff claims that William H. Moffat, May Moffat, Charles S. Howard and Nellie C. Harris had knowledge and notice of the alleged common scheme and design at the time of the transaction or transactions to which they were party *which would prevent such persons from being bona fide purchasers.*" (Emphasis added)

In presenting the indispensable parties motion to Judge Wollenberg, these respondents cited three decisions of the United States Court of Appeals for the

Ninth Circuit involving issues as to indispensable parties: *State of Washington* vs. *United States* (9 Cir. 1936) 87 F. 2d 421; *McShan* vs. *Sherrill* (9 Cir. 1960) 283 F. 2d 462; *Pioche Mines Consolidated* vs. *Fidelity-Philadelphia Trust Co.* (9 Cir. 1953) 202 F. 2d 944. These decisions followed principles which were announced by this Court in its early decision of *Shields* vs. *Barrow* (1854) 58 U.S. 129, 139, 15 L. Ed. 158.

State of Washington vs. *United States*, supra, involved facts greatly similar to the facts involved in Exhibit 58. It was a suit by the United States to establish ownership of tide flats at the mouth of the Columbia River, and to enjoin the defendants from occupying the lands under leases from the State of Washington, which also claimed ownership and sought to intervene as an indispensable party. The Court of Appeals held that the state was an indispensable party. In doing so, it laid down certain tests of indispensability which clearly apply to the situation shown by Exhibit 58.

The Court of Appeals said first that the absent party must be interested in the controversy. Obviously, the absent co-owners here are very interested in a controversy in which petitioner claims that their title is tainted with fraud to their knowledge and that they are not bona fide purchasers.

Next, the case laid down four further tests and ruled that if any one of the tests applied the absent party was indispensable.

The first involved the point of whether the interest of the absent party is distinct and severable. Here the interest of the Moffats is not distinct or severable. The Moffat title was acquired in the same conveyance simultaneously with the title acquired by respondent Elmer B. Stone who was named a defendant.

The second test is whether in the absence of such party the Court can render justice between the parties before it. If petitioner had prevailed in the absence of the Moffats and the other co-owners, these respondents would have been ordered, according to the prayer of the complaint (R. 458-459), to "restore, return, convey and otherwise transfer to" petitioner their respective interests in three oil and gas leases. This decree, however, would not have been binding upon the absent co-owner-lessors. They could have come into court subsequently against respondents demanding that respondents pay the royalties due under the leases and perform all the other obligations of the leases.

The third test is whether the decree made, in the absence of such party, would have an injurious effect on the interest of such party. It could hardly be contended that the interests of the Moffats and other co-owners would not have been injuriously effected if petitioner had been granted the relief it sought against co-owner Stone on the ground that the deed under which he and the three other co-owners acquired title was obtained through his fraud to the knowledge of the other three grantees. It would have clouded the title of the absent co-owners, and in a State like Cali-

fornia, where insurance is a must in any real estate transaction, the absent owners unquestionably would have found their titles uninsurable. It would be no answer to say that the Court below could have framed a decree that would have taken respondent Stone's interest and protected the interests of the absent co-owners. Before a Court could do this, it would have to determine the extent of Mr. Stone's undivided interest at the time of the decree. In making such a determination the Court would necessarily be determining the interests of the remaining co-owners in their absence and without giving them their day in court to have their say as to the extent of their interests. This action would be something in the nature of a partition suit in which the interests of the absent owners in this real property would be determined without giving them an opportunity to present their version of what their interests were.

The fourth test was whether the final determination would, in the absence of such party, be consistent with equity and good conscience. The discussions under the preceding headlines all add up to the inescapable conclusion that the court below could not render a final determination in the absence of the Moffats and the other co-owners or their successors consistent with equity and good conscience. Petitioner, by attempting to conceal the names of the "and others" to the documents mentioned in Exhibit 58, chose to create a situation in which Judge Wollenberg recognized that the Court could not, in the absence of these other co-owners, render a final determination consistent with equity and good conscience.

In *Pioche Mines Consolidated* vs. *Fidelity-Philadelphia Trust Co.* (9 Cir. 1953) 202 F. 2d 944, the Court of Appeals reaffirmed the tests of indispensability set out in the *State of Washington* case, and applied those tests to hold that a suit to enforce a settlement agreement which involved members of a Debenture Holders Committee who were not joined and who were not amenable to service of process, must be dismissed for lack of jurisdiction over indispensable parties.

McShan vs. *Sherrill* (9 Cir. 1960) 293 F. 2d 462, involved a suit in the United States District Court for Arizona, brought by the Sherrills, citizens of Arizona, against the McShans, citizens of California, to quiet title to the land on the east side of the Colorado River, which they claimed by accretion and which the McShans claimed resulted from perceptible and sudden changes in the river. After the Sherrills had their title quieted, the McShans brought out evidence showing tax assessments to and payment of taxes on this land by absent parties. They requested relief under Rule 60, which was denied. The Court of Appeals remanded the case to the trial court for determination as to ownership by absent parties, and for a dismissal if their joinder would oust the Court of jurisdiction. In its opinion the Court of Appeals said at page 463 of 283 F. 2d:

> "The District Court granted the relief requested, and thereby placed a cloud upon the title of the absent land owners. A decree so affecting the

> interests of persons not joined as parties is improper."

In connection with Exhibit 58, the respondents have established the interests of the Moffats and the other co-owners without any evidence to the contrary being offered by petitioner.

In the *McShan* case the Court further at page 464 of 283 F. 2d said:

> "The absence of indispensable parties can be raised at any time, however, even by the Appellate Court on its own motion."

Under the principles established by these decisions it is clear that Judge Wollenberg could have and should have considered jurisdictional motions raised against petitioner's second amended complaint, even in the absence of Judge Carter's Order of April 17, 1958 reserving to respondents the right as to petitioner's second amended complaint to renew jurisdictional motions made to the superseded first amended complaint or make new motions. The fact is, however, that the record of this case made the right quite clear.

In the light of the evidence and these legal principles, the only ruling that Judge Wollenberg could have made was that the jurisdictional point could be raised at any time and that the Moffats and the other co-owners who had succeeded to the interests of Nellie C. Harris and Charles S. Howard were indispensable parties to this action.

CONCLUSION

From the foregoing, it appears that there has been no departure from the accepted and usual course of judicial proceedings. Respondents pray that the petition for a writ of certiorari be denied.

Dated: December 12, 1963.

Respectfully submitted,

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